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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2020AP491

In the matter of the refusal of Kelly L. Springer

WASHINGTON COUNTY,
Plaintiff-Respondent,

v.

KELLY L. SPRINGER,
Defendant-Appellant

ON APPEAL FROM A JUDGMENT AND ORDER ENTERED IN
WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE
JAMES K. MUEHLBAUER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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PLAINTIFF-RESPONDENT'S BRIEF

ISSUES PRESENTED FOR REVIEW

- I. IS AN OFFICER REQUIRED TO ELICIT A VERBAL RESPONSE BEFORE ISSUING A REFUSAL, AFTER ASKING THE QUESTION, "WILL YOU SUBMIT TO AN EVIDENTIARY CHEMICAL TEST OF YOUR BREATH"?

The circuit court¹ answered "no."

This Court should answer "no."

¹ The Honorable John K. Muehlbauer presided at Mr. Springer's refusal hearing and found his refusal to be improper.

II. DID KELLY L. SPRINGER HAVE THE RIGHT TO HAVE HIS SUBJECTIVE CONFUSION ABOUT WHETHER TO SUBMIT TO AN EVIDENTIARY CHEMICAL TEST CURED BY THE ARRESTING OFFICER?

The circuit court² answered “no.”

This Court should answer “no.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of this Court’s opinion. The State’s brief identifies the relevant facts and principles of law. They combine to compel rejection of Springer’s appellate claims.

INTRODUCTION

Deputy Thomas Boisvert observed Kelly L. Springer driving his vehicle while deviating between lanes, driving partially on the shoulder of the roadway and crossing the center line of traffic, after which he conducted a traffic stop of Springer’s vehicle. Springer subsequently admitted that he had “a couple of beers tonight” and exhibited behavior leading Deputy Boisvert to believe he was impaired. When Deputy Boisvert later read Springer the Informing the Accused form and asked him, “Will you submit to an evidentiary chemical test of your breath?”, Springer refused to answer the question. Deputy Boisvert asked Springer the question four additional times and Springer repeatedly refused to answer the question. After Deputy Boisvert asked Springer the question for the sixth time, Springer finally answered by stating, “I already gave you one.” A hearing was held in front of the Honorable James K. Muehlbauer to determine if Springer’s refusal to submit to a chemical test of his breath was improper. The circuit court found the

² The Honorable John K. Muehlbauer presided at Mr. Springer’s Refusal Hearing and found his refusal to be improper.

deputy was not required to wait any longer for a response to the question and further found that the deputy was not required to provide any further explanation about the chemical test requirement. Therefore, the circuit court found that Springer's refusal was improper. Springer now appeals the circuit court's decision.

STATEMENT OF THE CASE

Relevant Factual Background

On Thursday, January 30, 2020, at approximately 7:43 pm, Washington County Sheriff's Deputy Thomas Boisvert observed a vehicle, southbound on Highway 45, travel from the right lane of traffic to the left lane of traffic and back again without signaling the turns. (R. 4: 5-12) Deputy Boisvert monitored the vehicle and observed the driver making multiple lane deviations without signaling, crossing the center line and crossing the solid white lines. (R. 4:21-25 and 5: 1-3) Further, Deputy Boisvert observed the vehicle travel across the solid white line near an off ramp and appear to begin to exit before moving back into the southbound lane of traffic by driving across the solid white painted line. (R. 5: 4-14) Deputy Boisvert then activated his emergency lights and attempted to conduct a traffic stop of the vehicle at which time the vehicle slowed down and pulled into the shoulder of the highway where it continued to travel for approximately 300 yards before coming to a stop. (R. 6: 2-10)

Deputy Boisvert approached the passenger side of the vehicle and observed the driver of the vehicle to be the sole occupant. (R. 6:19-25) Deputy Boisvert knocked on the passenger side window and attempted to get the attention of the driver however he received no response. (R. 7: 5-9) Deputy Boisvert then knocked on the window a second time at which time the driver rolled down the passenger side window. (R. 7: 8-11) Deputy Boisvert then identified the driver of the vehicle as Kelly L. Springer. (R. 7: 12-14) Deputy Boisvert noted that Springer took a long time answering his questions and fumbled when looking for his insurance information. (R. 7: 21-25 and 8: 1). Springer

admitted that he had just left a friend's home where he had several beers or a couple of beers. (R. 8: 4-6)

Deputy Boisvert then became concerned that Springer may be operating the vehicle while impaired and asked Springer to perform several different Standardized Field Sobriety tests. (R. 8: 11-24). One of those tests included the Horizontal Gaze Nystagmus test during which Springer exhibited six out of a possible six indicators of impairment. (R. 9: 1-8) Springer also submitted to multiple additional Standardized Field Sobriety tests during which he exhibited numerous indicators that his ability to operate a motor vehicle was impaired, (R. 9: 9-25 and 10: 10-21)

Deputy Boisvert then had Springer submit to a Preliminary Breath Test, the result of which indicated that Springer had 0.18 grams of ethanol in 210 liters of his breath. (R. 11: 5-22) After seeing the results of the Preliminary Breath Test, Deputy Boisvert came to the conclusion that Springer's ability to operate a motor vehicle was impaired and he placed Springer under arrest. (R. 12: 5-17)

Deputy Boisvert then informed Springer that he had to read him a piece of paper, that he had to read him the paper verbatim, that he can't deviate from the paper, and that after reading the paper he was going to ask Springer a question which would have a yes or no answer. (R. 19: 7-13) Deputy Boisvert then asked Springer if he understood and Springer indicated that he did understand. (R. 19: 12-15) Deputy Boisvert testified that he then read the Informing the Accused form verbatim and placed his own initials after each paragraph of the form confirming that he read that portion. (R. 13: 16-24 and 19: 16-18)

After Deputy Boisvert finished reading the form he asked Springer, "Will you submit to an evidentiary chemical test of your breath?" after which he paused and Springer refused to answer the question. (R. 14: 5-8) Deputy Boisvert testified that he again asked

Springer, “Will you submit to an evidentiary chemical test of your breath?” and again Springer refused to answer the question. (R. 14: 9-14) Deputy Boisvert testified that he asked Springer that same question about six times and after each time Springer refused to answer the question. (R. 14: 15-17) Deputy Boisvert then asked Springer the question a seventh time after which Springer responded, “I already gave you my test.” (R. 15: 1-4) Deputy Boisvert then marked the “No” box on the Informing the Accused form and interpreted Springer as refusing the chemical test. (R 15: 5-7). Deputy Boisvert then provided Springer with a copy of the form as well as the Notice of Intent to Revoke form. (R. 20: 16-18)

Deputy Boisvert testified that he waited approximately five to ten seconds between each time that he asked Springer to submit to the chemical test before asking him the question again. (R. 18: 1-15) Deputy Boisvert testified that it was his opinion that he waited a sufficient amount of time in order to allow Springer to answer the question. (R. 20: 2-8) Deputy Boisvert further testified that Springer never interrupted him while he was asking the question and never indicated that he didn’t understand the form or the question in any way. (R. 20: 9-17). During cross examination Springer’s defense counsel confirmed that after the last time the question was asked about submitting to a chemical test, Springer stated that he had already given a test and defense counsel stated, “I guess he was referring to the preliminary breath test?” to which Deputy Boisvert responded, “That would be my assumption.” (R. 18: 19-25)

At the conclusion of the Refusal Hearing the circuit court found that there was reasonable suspicion to conduct a traffic stop of Springer’s vehicle and probable cause to arrest Springer for an Operating while impaired offense. (R. 27: 5-7) The circuit court found that the Informing the Accused form was read to Springer verbatim by Deputy Boisvert and was done consisted with the requirements of the statute. (R. 27: 8-16) The circuit court found that the case law was clear in stating that the arresting officer is not required to explain the form and in fact, if the officer does try and explain the form the officer runs the risk of giving inaccurate information. (R. 28: 4-25). The circuit

court discussed Springer's argument that the deputy should have waited longer for Springer to answer the question. The circuit court found that the question was not asked "rapid fire" and that there was at least a pause in between each time the question was asked. (R. 29: 1-7) The circuit court further found that there was sufficient time for Springer to have answered the question and that the deputy had no further duty to explain. (R. 29: 7-12) Lastly, the circuit court found that there was no indication that Springer had a desire to cure his refusal and that there was no right to cure. (R. 30: 1-19) Lastly, the circuit court held that there was no claimed inability to take the test and therefore, the refusal was improper under the law. (R. 30: 21-25) As a result of the circuit court's ruling, evidence of Springer's refusal to take the chemical test would be admissible at an potential trial on the Operating While Impaired citation.

STANDARD OF REVIEW

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447.

ARGUMENT

I. The Circuit Court Properly Found that the Deputy was not Required to Elicit a Verbal Response when Asking Springer if he Would Submit to an Evidentiary Chemical Test of his Breath.

A. Controlling Principles of the Implied Consent Law

The implied consent law provides that a person who operates a motor vehicle in this state is deemed to have given consent to one or more tests of his or her blood, breath, or urine upon the request of a law enforcement officer if the person is arrested for an OWI-related offense. Wis. Stat. § 343.305(2). This court has explained that:

Under Wis. Stat. § 343.305(3)(a), a law enforcement officer may request that a person arrested for OWI provide one or more samples of the person's blood, breath, or urine for testing. A law enforcement officer must then read the implied consent warning to the person, explaining the nature of implied consent, warning of the consequences of refusal to submit to a test of the officer's choice, warning about the consequences of a prohibited alcohol concentration, and informing the person of his or her right to request an alternative test. Wis. Stat. § 343.305(4); *State v. Piddington*, 2001 WI 24, ¶1 n.3, 241 Wis. 2d 754, 623 N.W.2d 528.

State v. Krajewski, 2002 WI 97, ¶ 20, 255 Wis. 2d 98, 648 N.W.2d 385.

Under the implied consent law, "Wisconsin drivers are deemed to have given implied consent to chemical testing as a condition of receiving the operating privilege." *State v. Reitter*, 227 Wis. 2d

213, 225, 595 N.W.2d 646 (1999) citing Wis. Stat. § 343.305(2); *State v. Neitzel*, 95 Wis. 2d 191, 289 N. W.2d 828 (1980) at 193; *State v. Rydeski*, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997). Drivers accused of operating a vehicle while intoxicated therefore have no "right" to refuse a chemical test. *Id.* citing *State v. Crandall*, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986).

"Any failure to submit" to a request for a sample "constitutes refusal and triggers the statutory penalties" for an improper refusal. *Reitter*, at, 234 (citing *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997)). And failing to cooperate with the testing procedure can be a refusal, *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 191, 366 N.W.2d 506 (Ct. App. 1985).

If the person withdraws consent, and refuses to give a sample of his or breath, blood, or urine, as requested by the law enforcement officer, the law enforcement officer then issues a notice of intent to revoke the person's operating privilege. Wis. Stat. § 343.305(9)(a). The notice of intent to revoke informs the person that he or she has been placed under arrest for an OWI-related offense, that the officer read the informing the accused language to the person, that the person refused a request for a sample of breath, blood, or urine, and that the person has ten days to request a hearing, or will have his or her operating privilege will be revoked. Wis. Stat. § 343.305(9)(a)1.-4.

The notice of intent to revoke also informs the person that the issues at a refusal hearing are limited by statute. Wis. Stat. § 343.305(9)(a)5. The implied consent statute, Wis. Stat. § 343.305, provides that the issues in a hearing for a person who refuses to a request to submit to chemical testing are strictly limited to: (a) whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, and whether the person was lawfully placed under arrest for an OWI-related offense; (b) whether the officer complied with the information requirements in the statute; and (c) whether the person refused to submit to the test, whether the refusal was due to a physical inability

to submit to the test due to a physical disability or disease. Wis. Stat. § 343.305(9)(a)5.

At the close of the hearing, or within five days, the municipal court or circuit court that held the refusal hearing determines the issues listed in § 343.305(9)(a)5. Wis. Stat. § 343.305(9)(d). If each issue is decided adversely to the person, the court is required to revoke the person's operating privilege. Wis. Stat. § 343.305(9)(d), 10. If the court decides one or more issues favorably to the person, the court "shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question." *Washburn County v. Smith*, 2008 WI 23, ¶ 2, 308 Wis. 2d 65, 746 N.W.2d 243 n.3, citing Wis. Stat. § 343.305(9)(d).

B. The Law Does Not Require an Officer to Wait a Specified Amount of Time for a Verbal Answer to the Form's Question.

The State is in full agreement with Springer's admission that the case law clearly states, "the obligation of the accused is to take the test promptly or to refuse it promptly." *Neitzel at 205*, 835. Furthermore, the Court in *Neitzel* found that "there is no obligation upon the law enforcement authorities to renew the offer to take the test, even though the time within which the test may be admissible the two-hour period after the arrest has not yet expired. The obligation of the accused is to take the test promptly or to refuse it promptly. If he refuses, the consequences flow from the implied consent statute." *Id.*

"Section 343.305(1) STATS., provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 191 366 N.W.2d 506 509 (Ct. App. 1985). Any failure to submit to such a test, other than because of physical inability, is an improper refusal which involves the penalties of the statute. *Id.*" *State v. Rydeski*, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997). Additionally, the court in *Rydeski* found that "a

verbal refusal is not required. The conduct of the accused may serve as the basis for a refusal.” *Id.*

The facts of *Rydeski* are similar in nature to the facts in the case at hand. Rydeski initially consented to a breath test however once he was asked to actually submit to the test he insisted on using the restroom alone. *Id.* As in our case, the testing officer asked Rydeski five or more times to submit to the test after which he marked the test as a refusal. *Id.* The court in that case held that “Rydeski’s conduct prevented [the officer] from administering the test, and therefore, we conclude that Rydeski refused to submit to the test.” *Id.* at 107, 419. *Rydeski*’s argument was similar to Springer’s in that he suggested that courts should look at the totality of circumstances when determining if a refusal occurred. *Id.* The court disagreed with that argument and instead ruled that “a person’s refusal is thus conclusive and is not dependent upon such factors as whether the accused recants within a ‘reasonable time’..” *Id.* at 420. The court emphasized that not only must a person promptly submit or refuse to submit to the test, but that “the officer may ‘immediately’ gain possession of the accused’s license and fill out the Notice of Intent to Revoke form.” *Id.* The court reiterated the term “immediately” several times emphasizing the lack of a requirement to wait a specified amount of time prior to considering the accused to have refused the test. *Id.*

II. The Circuit Court Properly Found that the Deputy was not Required to Cure Springer’s Subjective Confusion.

Even though Springer never asked any questions of the officer regarding the form and never made any indication that he was confused about the form or the requested tests, he now asserts that he was in fact confused and that the deputy was required to cure that confusion. Springer argues that the arresting officer should have informed him that the Preliminary Breath Test did not “count as an implied consent test”. *Brief of Defendant-Appellant* p. 7. Springer attempts to convolute the issue by admitting, “it is true that a defendant may not make a subjection confusion” argument when the Informing the Accused Form is read verbatim and the arresting officer does not try to add information

to that which appears on the form...” *Id.* at p. 10. Springer then goes on to argue that he was not subjectively confused, but rather was confused about what constituted a breath test. *Id.* There is zero difference between the two arguments. Springer is still arguing that he was confused about the form and that the officer had a duty to explain the form to him – essentially curing his subjective confusion.

A. The Form Itself Specifically informs the Accused that the Law Enforcement Agency would be Testing *One or More* Samples of Accused’s Breath.

Wisconsin Statute section 343.305 (3) specifically states, (a) upon arrest of a person for violation of s. 346.63(1)(2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63(2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or upon arrest subsequent to a refusal under par. (ar), a law enforcement officer may request the person to provide **one or more samples of his or her breath, blood or urine** for the purpose specified under sub. (2). The Wisconsin Department of Transportation Informing the Accused form, mirrors the language in this statute in paragraph two which states, “This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system.” *Informing the Accused*. Additionally, in paragraph three of the form it further clarifies that there may be more than a single test when it states, “If you take all the requests tests, you may choose to take further tests.” *Id.* This is the form that was read to Springer by Deputy Boisvert and therefore, Springer was clearly put on notice that the agency would be testing “one or more” samples and therefore, the fact that a Preliminary Breath Test was already conducted is irrelevant to the analysis.

The parties agree that a Preliminary Breath test is not the same as the evidentiary chemical breath test. Wisconsin Statutes section 343.303 describes the Preliminary Breath test and specifically differentiates it from the chemical breath test by clarifying, “The result of this preliminary breath screening test may be used by the law

enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of x. 346.63(1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63(2) or (6), 940.09(1) or 940.25 **and whether or not to require or request chemical tests as authorized under s. 343.305(3).**” (emphasis added).

B. There is no Right to an Explanation of the Law or the Form

There is no case law that Springer can point to which indicates, in any way, that the accused has the right to have the legal difference between the Preliminary Breath Test and the evidentiary chemical breath test explained. The cases cited by Springer are so completely different than the case at hand that they provide no guidance to this Court whatsoever. To the contrary, courts have consistently found that the officer should not provide any legal advice or explanation of the Informing the Accused Form. Courts have found there to be a “stringent three part standard that is applied to assess the adequacy of the warning process under the implied consent law:

...a stringent three-part standard that is applied to assess the adequacy of warning process under the implied consent law: (1) Has the law enforcement officer not met, or exceeded his or her duty under § 343.305(4) and 343.305(4m) to provide information to the accused driver; (2) Is the lack or oversupply of information misleading; and (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

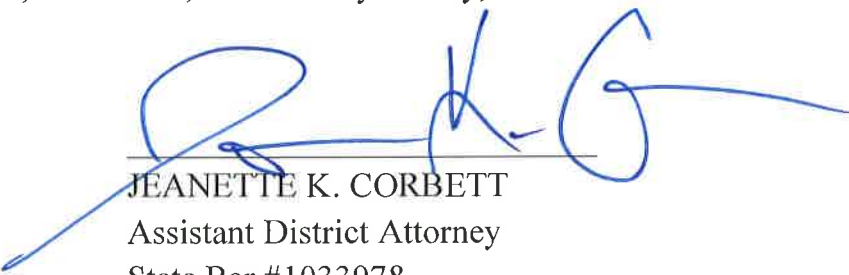
County of Ozaukee v. Quelle, 198 Wis. 2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995), *abrogated on other grounds by In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243.

Quelle argued that her subjective confusion about a second test should have been cured by the arresting officer. *Id.* at 284, 202. The court declined to accept Quelle's argument that officers have a duty to explain, rather than simply to read the Informing the Accused Form. The court in that case held that they would not create a new defense of subjective confusion and reiterated that Wisconsin Courts have "... have repeatedly stated, an officer's only duty under the implied consent law is to accurately deliver the information to the driver; an officer need not explain all of the choices (and resulting consequences) embodied within these statutes." *Id.*

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm the finding of the circuit court that Springer's refusal to submit to a chemical test of his breath was improper.

Dated at West Bend, Wisconsin, this 29th day of July, 2020.



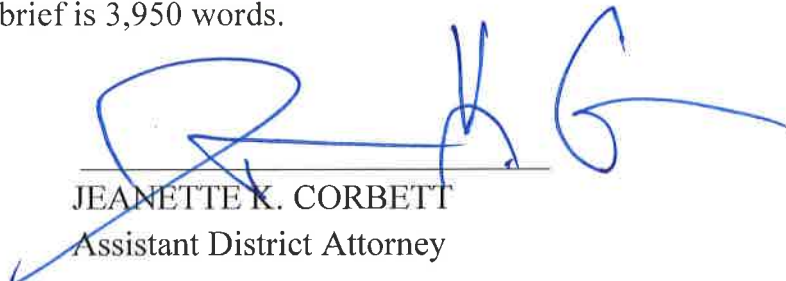
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,950 words.



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Assistant District Attorney

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of July, 2020.



JEANETTE K. CORBETT
Assistant District Attorney

CERTIFICATION OF MAILING

Pursuant to Sec. 809.80(3)(b), Stats., I hereby certify that on the 29th day of July, 2020, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the original and ten (10) copies of the Plaintiff-Respondent's Response to the Brief of Appellant addressed to the following named person at the following post office address:

Wisconsin Court of Appeals
110 E. Main Street, Suite 215
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Madison, WI 53701-1688

Further, I hereby certify that on the 29th day of July, 2020, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the three (3) copies of the Plaintiff-Respondent's Response to the Brief of Appellant addressed to the following named person at the following post office address:

Matthew M Murray
524 South Pier Drive
Sheboygan, Wisconsin 53081

Dated this 29th day of July, 2020.


JEANETTE K. CORBETT
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